

Milton Planning & Zoning Commission Meeting
Milton Library
Tuesday, March 17, 2009
7:00 p.m.

1. Michael Filicko called the meeting called to order at 7:00 p.m.
2. Roll call of Members Present:
 - Ted Kanakos
 - Ed Kost
 - Al Perkins
 - Michael Filicko
Members Absent
 - Virginia Weeks
 - Gene Steele
 - Louise Frey
3. Changes, additions, corrections or deletions to the Agenda
Al Perkins: I make a motion to approve the Agenda.
Ted Kanakos: second.
Michael Filicko: All in favor say "Aye". Opposed. Motion carried.
4. Approval of Minutes from January 20, 2009
Michael Filicko: Any changes, additions, corrections or deletions to the Minutes of January 20, 2009.
Al Perkins: I make a motion to approve the Minutes of January 20, 2009, as presented.
Ted Kanakos: Second.
Michael Filicko: All in favor say "Aye". Opposed. Motion carried.
5. Final Sub-Division Approval of Shipbuilders Village
The Applicant, Shipbuilders Village, is requesting final approval for a major sub-division of a parcel of land located on the northwest corner of Mulberry Street and Shipbuilders Boulevard. The property is currently zoned R-1 Residential and is further identified by Sussex County Tax Map Parcel 2-35-14.00-565.00. Is there anyone present from Shipbuilders?
Robert Sevenski: I am a landscape architect with Ramesch Batta Associates. I'm not necessarily here from Shipbuilders Village, but I represent them, as best as I can tonight. We are the design engineer for the sub-division.
Michael Filicko: Would you like to present to the Committee your agenda, please?
Robert Sevenski: Yes, it's fairly straightforward. I'm sure that we're all familiar with it at this point. It is a site at the intersection of Shipbuilders Boulevard and Mulberry Street. It's approximately 2.5 acres and we are asking for final sub-division approval to sub-divide the parcel into 7 lots. There are no new streets

proposed; or anything of that nature. There are utility extensions; sanitary sewer and storm sewer and water to serve the new parcels, and that's basically it. I believe it's pretty straightforward. The existing parcel, again, into just 7 lots.

Michael Filicko: Any comments from the Town Engineer or the Town Solicitor?

Bob Kerr of Cabe Associates, Town Engineer: In addition to the sub-division and the record drawing and the sub-division construction drawings have been reviewed and meet the town requirements and the stipulations made in the preliminary sub-division approval; there is also a second set of drawings that were prepared by Merestone Consultants that addressed stormwater issues in Shipbuilders Phase I. Those drawings have been reviewed by my office. They have also been reviewed and approved by the Soil Conservation District and that's part of this, although I'll let the attorneys say exactly how it meshes into this. The sub-division, more or less, stands by itself; but this was a condition that these drawings also be prepared and submitted.

Tim Willard: I used to be the City Solicitor and I hung on to this little project. Just to give you some history of it; Shipbuilders had stormwater problems back in the back west corner of it and they have been pumping, I know that. The Town withheld CO's and then Gemcraft sued the Town, because they owned the lots and that case was dismissed because of Summary Judgment. At the same time we cross-claimed and that is, reached out and sort of sued Shipbuilders; whether that litigation is still alive or not is some question; but, having said that, Shipbuilders, several years ago, knocked on your door to get approval for the sub-division and at that time, we said or you said in your wisdom okay; well if it meets the sub-division requirements, fine. But you're going to fix the stormwater problems in the back, as a condition. An agreement was entered into; or a condition of preliminary to grant them what you see before you and it's substantially the same 7 lots from the preliminary; but also has a condition that they improve the stormwater. With that agreement, which specifically cited a Merestone Engineering drawing that was approved by Soil Conservation District that has jurisdiction over stormwater; also it was reviewed by your Town Engineer. I note on the final site plan that condition and I requested that it be included in there. Its Condition 16: The Town of Milton will not issue building permits for this Phase until storm drainage improvements on South Spinnaker Lane near the western end of Rudder Lane have been completed by the developer to the satisfaction of the Town of Milton. I drafted just brief findings and conditions which you can use. I think you have the older agreement. This is just pared down for final and the findings that I proposed are simply that the proposed sub-division, and I will just take a second to summarize it if I can, unless you want to stop me. "The proposed sub-division is in compliance with the Town of Milton sub-division ordinance in that the final plan is in substantial conformity with the approved preliminary plan. The final plan has received all necessary agency approvals (and for that you rely on Mr. Kerr). The final plat incorporates the conditions placed on the preliminary plat that the stormwater problems in the entire sub-division be fixed, completed and approved by the Town before any building permits be issued for the new lots approved herein and that the recorded final plat record this condition by note thereon (and they have the note on that). The conditions of the final that I suggest

you consider for recommendation to Council, some of them are standard ones that water and sewer service will be provided to the existing lines. There should be no more than 7 lots. In the event that the existing lots within Shipbuilders Village face the desire to form a Homeowner's Association the developer shall cooperate with the association to establish the HOA and to integrate the project into the Homeowner's Association governing Phase II for the development shall be integrated into existing sewer and water the applicant shall apply with all roadway and entrance requirements of DelDOT. The developer shall insure appropriate easements and approvals are obtained to install the stormwater management plan prepared by Merestone Consultants, Inc. dated October 2, 2006 as reviewed by Cabe Associates and as approved by the Sussex Conservation District. The Plan shall be recorded with the final plat. In other words, I think it is a good idea that when this is recorded, that the Merestone plat should be recorded with it, so there is no question what we expect to be built or installed. Basically, it is a drainage pipe that goes to the western corner down to Wagamon's and I think they have already obtained their easements. The plan shall be recorded with the final plat. No building permits shall be issued for 7 lots in the proposed sub-division until the stormwater management project is complete and approved by the Town Engineer. The current developer, Shipbuilders LLC, as these conditions apply to the developer, its successors and assigns and shall be recorded with the sub-division plot in the Sussex County Recorder of Deeds, Purchaser of the Proposed Sub-Division Lots are expressly notified of these conditions. If these conditions are not met, declaratory, equitable or compensatory relief may be sought by the Town of Milton." Also, I think it is probably a good idea and I don't know if you can speak for the developer in this sense, that you recommend to Council that they pursue a Performance Bond. Your Code has a section and I don't know if your Town Solicitor is more familiar with this than I am. As a condition of approval of improvement plans, the Town Council shall require the sub-divider to post a Performance Bond or other guarantee for any improvements required by the Applicant of this Chapter in an amount sufficient to construct the improvements in a form acceptable to the Town Solicitor and the Town Engineer. The Applicant can submit a detailed estimate for the cost of improvements. The amount of such bond shall be no less than 125% of the cost of improvements. Bonding guarantees shall be required for the following; and it includes stormwater. So I think the authority is there clearly to ask for it and it seems like we've come this far; it seems like the developer is moving forward with it. All along we've tried to use their interest to satisfy our interest.

Ted Kanakos: I have a number of questions. If the developer can not start to build until this is completed, the stormwater problem is corrected; how can someone use this as a matter of a build when they're not allowed to build based on having to correct the stormwater problem before they build?

Bob Kerr: There are things they can do before a building permit is issued. There is a new water line to be constructed; there is sidewalk to be installed; there is a sewer system pipe to put in; the lots need to be graded to meet the stormwater design of the sub-division; all of that work can be done. What we have tried to do in this is not allow them to start the actual construction of a building so that none

of the homes can be built. The developer if he wants to spend all his money putting in the infrastructure, without doing the storm sewer is more or less at his option and I don't think he would want to do that; he would want to make sure that if he spends any money on it that he could move forward.

Ted Kanakos: What are the changes between the preliminary and the final that you have introduced?

Robert Sevenski: There are no major changes. Everything is pretty much consistent; other than we've gone through several agencies; Fire Marshall's office; the Town Engineer's office; Sussex Conservation District; DelDOT; an example was we showed two driveways onto Mulberry Street. DelDOT has required that those driveways be combined into one. So are the types of changes; which the lot configuration is still the same; but it was basically satisfying all the individual requirements of all the agencies and then trying to tie it all together.

Ed Kost: If these plans are approved, could the developer then sell the lots to someone else and would we be back dealing with someone else trying to solve this stormwater drainage problem if we don't get a Performance Bond now?

Robert Sevenski: It's my understanding that this agreement goes with the lots; so whatever developer owns...

Tim Willard: The homeowners couldn't build; they couldn't get the true value out of it; that's the idea to some extent. The developer could just walk away from a project; but hopefully they don't; they want to get something out of it and they couldn't pull a building permit unless they fix the stormwater.

Mary Schrider-Fox: I just want to point out that that is one of the conditions that Mr. Willard wrote into the Proposed Findings and Conditions that he read out earlier; is that this obligation will travel to successors and assigns. If a new developer came in and said he had purchased the entire project, that person would purchase it subject to these conditions as well.

Tim Willard: That's the importance of the recording because that puts society on notice that this runs with the land.

Ted Kanakos: It's more important than his house; people are calling him; it's like every time there's a way out; this is going on what 20 years? It's been going on for a long time. There have been a number of developments in there; maybe Mr. Gitano isn't sure what he owned at one time.

Tim Willard: I'm aware that that is part of the problem. This is sort of a way to address it efficiently, hopefully. The only thing that was not included in my written proposal to you, as far as findings and conditions is the recommendation of a Performance Bond, which I think is important.

Michael Filicko: Could you explain that please, Mr. Willard.

Tim Willard: Well, generally, I just propose what I read.

Michael Filicko: The Performance Bond.

Tim Willard: Well, maybe Mary would like to talk about the Performance Bonds.

Mary Schrider-Fox: Mr. Willard touched on it earlier when he when he was talking about in the Code, Section 17-37 talks about a Performance Bond. That actually is mandatory language in that section, so I don't think that it's imperative that it be in the Proposed Findings and Conditions because the way that it reads it says: "As a condition of approval of improvement plans, the Town Council shall

require” so that means that is something that the Town Council does after you provide your recommendation and this goes before the Town Council. This section means that they are going to require some kind of a Performance Bond that insures that the work will get done. I know we’ve had the issue of Performance Bonds being required in connection with other projects previously and what that does is provide a remedy to the Town in the event the work doesn’t get done; they have this bucket of money that they can tap into if they need to complete the work.

Ted Kanakos: Mr. Willard, do you know of any of these Performance Bonds when you were the Town Solicitor that were applied?

Tim Willard: That’s probably why I put it in the condition. I don’t disagree with Mary that they shall; but there’s a history that the Town was not doing them and this is an old...

Ted Kanakos: So the Town Council at their discretion can require it?

Mary Schrider-Fox: Well and I would just like to point out that this has been on the radar of the Town Council lately, the issue of Performance Bonds. I know that in a recent project, I think it was Heritage Creek, just this past fall, while I was on vacation so I didn’t review it, but my partner did and a Bond was required there and some paperwork came through our office so I know that in another project; so they started enforcing 17-37 section of the code. They are aware of it and I’m aware of it, Robin is aware of it and Wagamon’s West Shore as Robin just shared with me also had one. Section 17-37 is the section of the code.

Ted Kanakos: So we basically don’t have to address ourselves to that issue; the Town Council then will monitor that.

Ed Kost: I think we should address just to make sure that the Town Council addresses it.

Mary Schrider-Fox: That is certainly well within your rights to do that as a double track measure if you would like to. It can’t hurt.

Ed Kost: Let’s make that one of our recommendations; remind them that they have the responsibility to do certain things.

Michael Filicko: So we may place that in our recommendation then.

Mary Schrider-Fox: You certainly may.

Ed Kost: In Robin Davis’s letter here it says “It is recommended that the Town’s Attorney be requested to review and comment on the requirements of the Homeowner’s Association prior to acceptance. What was that about?

Mary Schrider-Fox: I can go ahead and address that for you if you like. In order to form a Homeowner’s Association, the developer needs to file a certificate of incorporation with the Division of Corporations with the Secretary of State that creates the artificial entity; then they also need to encumber the land with a declaration of covenants or a similarly named document like we have in Cannery Village or some of the other developments; that is your document that gives you all the who does what; and what runs with the land; and the various obligations to pay assessments and things like that. I have seen those documents; they were provided to me late last week or earlier this week; and they look fine. John Pardie of Prickett, Jones and Elliott prepared those and they looked pretty standard and the things that we are looking for in those documents are there. That is the

creation of a Homeowner's Association; mandatory membership. If you are an owner of a lot, you have to be a member; you don't have an option, so that's an important thing. You don't want anybody to be able to opt out; and an obligation for the Association to maintain the drainage situation for those 7 lots, at least; and also an obligation on the part of the Association and its members to pay for that. At least with respect to this section, this Phase III section, a Homeowner's Association will be formed; they have the documents ready and they all look good.

Ed Kost: My question is there is no Homeowner's Association in existence now for the previous sections?

Mary Schrider-Fox: I am not 100% familiar with the history of the community; but it is my understanding from reading through some of the materials that no, previous sections did not create or have a Homeowner's Association form and that's been a problem because the community is older and it has been developed in different stages and at this point in time you would have to get the consent of each of these existing owners to become a member. It has happened in other communities that have a long history in Sussex County and it has been just as difficult there; if that provides any comfort; but at least for this new section, they are going to have a Homeowner's Association as a requirement. That is one of the conditions also is related to this in the Proposed Conditions from Mr. Willard and that is that in the event one of the other Phases can somehow get it together and form an Association, that the developer is going to encourage that and who knows, maybe in the future, we'll have the different phases join together which by operation of corporate law they can do that and merge. At least this gets it started for one portion of the community; which is the best I think we can do right at this moment.

Al Perkins: What is the importance of the Homeowner's Association for this particular phase? Why is that important and why were they advised to do this?

Tim Willard: Part of the problems we have with the rest of Shipbuilders' is that there wasn't a Homeowner's Association and the Homeowner's Association should spell out various mechanisms and recourse for dealing with common area. Whether its parks or drainage and that triggers also recourse that's more efficient in court; you can go to chancery court on a Homeowner's Association dispute and get things settled quickly in mediation. The rest of Shipbuilders didn't have it and the streets weren't dedicated; and it was in the early 80's when Shipbuilders was approved; everybody was so happy; big project; and we weren't as sophisticated as we are now; and as we will be in 20 years. That's the importance of a Homeowner's Association.

Bob Kerr: The other important thing on this particular sub-division is there is on-site storm drainage. It's a little small swail; but the Homeowner's Association is charged with the maintenance of that swail and a piece of pipe that is probably not longer than this table, but it's their pipe; not the Towns pipe; so at least someone is now responsible for the maintenance. Before, about the only thing that was there, that the Town probably would have liked to have seen a Homeowner's Association for, was when the issue of the clubhouse or the pool came up, there is nobody responsible for it, other than the developer. There was no way of

assessing a charge to the people who live there to take over the maintenance and the operation of the facility.

Tim Willard: And the developer just sold lots to Gemcraft, so they would duck responsibility, to use that word. They were just selling the lots.

Ted Kanakos: Most or a lot of these are just rentals. So these people are not gathering together for anything long term. It's the owners that would have contact.

Michael Filicko: Is there a place for the homeowner's to meet, other than in one of the perspective homes on one of those 7 lots?

Mary Schrider-Fox: Mr. Willard can correct me if I'm wrong. In reviewing the plans, we're just talking about a small 7 lot section of this overall sub-division. There is no plan on there for a clubhouse or other kind of meeting area. Having said that, the only members of this particular association would be those 7 households. So, at least we're not talking about a group of 600 owners that have to meet in someone's living room. If we put it in perspective, that's not such a bad thing when we're talking about this sub-unit of the overall community. There are no plans for a clubhouse or something else like that.

Michael Filicko: So it would be difficult then, if the other phases of the community wanted to join a Homeowner's Association?

Mary Schrider-Fox: I think that in the event that they got a larger group together of owners, there are a lot of other communities that don't have space that would accommodate a large group. Some of the more modern ones do. One that comes to the top of my head is the Villages of Five Points. They have a large community center meeting room. The entire project was designed with that in mind; knowing it would be a large group. Other communities regularly rent out meeting rooms in a hotel or the library here or the theater or something like that.

Ed Kost: In Cannery Village we use the Fire Hall; that's where we have our meetings.

Mary Schrider-Fox: In Millville, the Millville Fire Hall is a very popular place for meetings and it's reasonably priced.

Michael Filicko: Thank you.

Tim Willard: Wagamon's also has a Homeowner's Association and they don't have a clubhouse nor is there a plan for one. At Cannery Village there is a plan for a clubhouse, eventually.

Michael Filicko: So it's my understanding that the 7 homes can be built, but a building permit can not be issued for someone to live in those homes until the stormwater is addressed? Is that correct?

Mary Schrider-Fox: I'm going to correct that just a little bit. What you're thinking about is the Certificate of Occupancy that needs to be issued before someone can actually move into their house. The building permit gets issued when the person is ready to start construction.

Michael Filicko: Thank you.

Al Perkins: So the stormwater relates to the building permit?

Mary Schrider-Fox: Correct. That's when the conditions Mr. Willard pointed out that's actually on the plan.

Ted Kanakos: They can do their land development up to the point where they start to build the house. At that point the stormwater problem will be corrected if he is to go forward. It's that simple.

Mary Schrider-Fox: Correct.

Tim Willard: Somebody mentioned to me, what about a time factor? Because your preliminary could go stale in a year; you don't have staleness for finals.

Robin Davis: It's the same thing for a final; a year.

Tim Willard: If Council follows your recommendation if it is to ask for a Performance Bond, that's something we might be able to work into the Performance Bond and I'll work with Mary if it comes through. They can't move forward unless they do that. They could always just walk away from the project and then we would have to think of some other options. We may be able to get a time limit on it when we can execute on the Bond. I have to talk to Mary about that.

Al Perkins: Just a clarification on the Performance Bond issue since we kind of just introduced that. That doesn't create an additional step for the developer. They don't have to come back here to us to deal with that, right?

Mary Schrider-Fox: Correct.

Michael Filicko: Mr. Sevenski, so the 7 lots need to be sold prior to completing the project, is that correct?

Robert Sevenski: I don't believe that they have to be sold. They will be sold eventually, but I think the bottom line is before somebody can put a shovel in the ground to build a home it's tied into the stormwater improvements that are required in another part of the site. This developer can build on those lots or he may choose to sell these lots to another builder. I don't think he's obligated one way or another as far as who actually physically builds the home.

Michael Filicko: I guess the question that I'm trying to ask is the funding available to correct the stormwater issue, is that available or am I out of line in asking that question in a Planning & Zoning meeting?

Tim Willard: I don't mean to be blunt about that, but they have the incentive to sell lots but they're not going to sell lots but they're not going to sell any lots; they could sell lots but they couldn't build a home on them. The developer couldn't develop this, cash in on this property, unless they finished the stormwater. Probably what will happen is there may be some financing that's available because they get final and they get the stormwater done, they sell some lots, and they pay themselves back...

Bob Kerr: If I may add to that, in discussions that Robin and I have had with the developer or one of his representatives, essentially they need final approval to go to the bank to get the financing and the bank because of the financial conditions today was very close to saying drop it in January if they didn't have approval by early February, that was it. We've done everything we can to speed this process up to get the drawings to you so that approval can happen and the bank will hopefully provide the funding. Once there is something the bank can say yes, you are going to go ahead and build, but they're not going to loan money based on you might get approvals.

Ted Kanakos: Who determines the price of the Performance Bond? Is there an estimate for the work; you must already have an estimate. You have two?

Tim Willard: I think it requires that they inspect a proposal or a bid and that's where they get the 125%.

Michael Filicko: Mr. Sevenski, it seems you are here in good faith, obviously, however, this has been an issue for the Town for I don't know how many years; way before I have been on this committee and I'm just trying to clarify everything so that the stormwater issue is remedied; that's why I'm trying to cover all the bases that I can.

Robert Sevenski: I understand. Unfortunately, I'm not familiar with the entire history myself. I hear just from commission members or in conversation with the Town Engineer; some of the history and conversation with my client; but we were charged with getting the final plans approved and ready for recordation, is the bottom line, so I really can't speak of the entire history. I understand where the questions come from, but I'm not fully aware of everything. I can't speak for the developer as far as specifics go. I'm just representing the engineering company who was hired by the developer to actually complete the plans.

Michael Filicko: Does anyone else have any other questions? Would anyone like to make a motion?

Al Perkins: I would like to make a motion that the Planning & Zoning Commission approve the sub-division plan for Shipbuilders Village for 7 lots that they meet the condition that the stormwater drain and that we insure that we incorporate the whole letter of agreement that was proposed by Tim Willard that covers the agreement with the developer and would also add that the Planning & Zoning Commission would confirm and reinforce to the Town Council that a Performance Bond should be provided by the developer as a condition of the approval and confirm that we agree with the previously approved commitment that a Homeowner's Association be organized and incorporated and in tact so that they can also assume the responsibility for managing the stormwater system when installed.

Michael Filicko: Ms. Schrider-Fox do you think there is anything else that Mr. Perkins needs to put in his motion?

Mary Schrider-Fox: No, I think you put in everything by incorporating Mr. Willard's Proposed Findings and Conditions and the Performance Bond issue and Homeowner's Association issue; so I think that covers all the bases; between those three things we have the various conditions and agreements set forth. I'm okay with it.

Michael Filicko: Do I have a second.

Ted Kanakos: I second.

Michael Filicko: Roll call vote:

Ted Kanakos	Yes
Ed Kost	Yes
Al Perkins	Yes
Michael Filicko	Yes

Michael Filicko: Motion passed

Robert Sevenski: Thank you very much.

6. Adjournment

Michael Filicko: There is not anything else on the agenda, so we need a motion to adjourn.

Ted Kanakos: I make a motion to adjourn.

Ed Kost: Second.

Michael Filicko: All in favor say "Aye". Meeting adjourned at 7:40 p.m.